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Thirty-third session

SUMMARY RECORD OF THE 696th MEETING

Held at Headquarters, New York,
on Monday, 26 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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The meeting was called to order at 10.05 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4; A/CN.9/XXXIII/CRP.2 and Add.1-2)

1. The CHAIRMAN recalled that at the previous meeting the Commission had taken up the issues of whether to refer the draft Convention back to the Working Group, and whether to recommend to the General Assembly that the draft Convention should be adopted at a diplomatic conference, or by the Assembly itself. The Commission had now received the rest of the report of the drafting group (A/CN.9/XXXIII/CRP.2 and Add.1-2), which it would need to consider.

2. Mr. BURMAN (United States of America) said his delegation recommended that the Commission should continue its efforts to resolve outstanding issues in relation to the draft Convention before taking up the drafting group's report.

3. Mr. ATWOOD (Australia) said it was disappointing that the Commission had been unable to complete its consideration of the draft Convention. If the draft text was referred back to the Working Group, the task of that Group should be clearly defined. As to the question of whether the draft Convention should be adopted by the General Assembly or at a diplomatic conference, his delegation believed that the Commission should make an open-ended recommendation to the General Assembly, leaving open the possibility of the draft Convention being adopted by either process.

4. Ms. MANGKLATANAKUL (Thailand) said that her delegation was in favour of referring the draft Convention to the Working Group. Many new issues had been raised which needed to be re-evaluated. Her delegation hoped that the draft Convention would be adopted at a diplomatic conference, depending on the financial possibilities.

5. Ms. McMILLAN (United Kingdom) said that her delegation associated itself with the two previous speakers. The Working Group's task and terms of reference must be clearly defined.

6. Mr. PANG (Singapore) said his delegation felt that any further consideration of the draft Convention should be carried out by the Commission, since the Working Group had already completed its work. Sending back the draft Convention to the Working Group would enable the latter to reopen issues which had already been settled, no matter what its terms of reference. Moreover, the Commission's resources would be put to better use if it considered the draft Convention directly.

7. Mr. BURMAN (United States of America) said that there seemed to be considerable support for sending the draft Convention back to the Working Group. The Working Group had not actually completed its consideration of the text, and a number of issues had been left unresolved. There would be an understanding that issues which had already been resolved would not be reopened. His delegation supported the idea that the Commission should send a draft resolution to the Sixth Committee on the adoption of the draft Convention either by the General Assembly, in 2001, or, if a host country had been secured and there were

assurances that the costs would be contained within existing budgetary resources, at a diplomatic conference.

8. Mr. HERRMANN (Secretary of the Commission) said that if the draft Convention was adopted at a diplomatic conference, it was unlikely that the host State would cover all the costs; the tradition had been that the host State would pay the difference arising from the fact that the conference was not taking place at the location of the substantive secretariat. It was difficult to make an estimate of the costs, which would depend partly on the extent to which modern technologies could be used. The Commission should draw up a draft resolution so that that internal process could be started and the possibility of holding a diplomatic conference could be taken into account when the next programme budget was drawn up.

9. Ms. STRAGANZ (Austria) said that her delegation was in favour of referring the draft Convention to the Working Group, and of formulating an open-ended draft resolution on the adoption of the draft Convention.

10. Mr. MOHAMED (Nigeria) said that his delegation would prefer the draft Convention to be finalized in the Commission, rather than the Working Group. It was premature to take up the question of a diplomatic conference, before completing work on the draft Convention.

11. Mr. HERRMANN (Secretary of the Commission) said that the Working Group could meet in December 2000. However, if the Commission wished to continue its consideration of the draft Convention it would have to do so in January 2001, since it had exhausted its entitlements for 2000.

12. Mr. GHAZIZADEH (Islamic Republic of Iran) said that his delegation was in favour of sending the draft Convention back to the Working Group, so as to avoid delays in finalizing the draft Convention. His delegation supported the idea of holding a diplomatic conference for the adoption of the draft Convention.

13. Ms. GAVRILESCU (Romania) said that her delegation could go along with any decision which was supported by the majority of members of the Commission. However, it would be preferable not to send the draft Convention back to the Working Group, because the latter had referred some unresolved issues to the Commission, which had not yet resolved them. She also had reservations about making a recommendation about the adoption of the draft Convention because the text had not been finalized.

14. Mr. DOYLE (Observer for Ireland) said that the Working Group, although it had done all it could, had clearly not completed its work; if it had, the Commission would not have spent two weeks discussing the scope of the draft Convention. Much remained to be done. Indeed, another session might not suffice for the Commission to finalize a text. He was therefore in favour of referring the matter to the Working Group, obviously with strict terms of reference. He saw no insuperable difficulty in circulating the Working Group's report. On the question of a diplomatic conference he urged flexibility.

15. Mr. MARADIAGA (Honduras) said that ideally the Working Group should reconsider the draft text and return it to the Commission. Progress had been so

slow, however, that his preference would be to allow the Secretariat to make the decision, on the basis of circumstances as they unfolded. The option of holding extra meetings was impracticable, owing to the shortage of resources.

16. Mr. MORÁN BOVIO (Spain) said he was in favour of returning the draft text to the Working Group: the impact of the Commission's deliberations had been such that the whole conformation of the draft Convention had changed. He trusted that at its next session the Commission would be able to review the Working Group's work faster than at the current session.

17. Mr. TELL (France) said that, given the shortage of available time and the fact that the Commission would in any case have to scrutinize any draft text, it would be better for the Commission to assume the work itself. Moreover, discussion of article 18 onwards, on which substantive decisions would need to be taken, would inevitably lead the Working Group to reopen issues that had already been settled.

18. Mr. Al-NASSER (Observer for Saudi Arabia) favoured returning the text to the Working Group, many of whose members also participated in the Commission. The Working Group could submit a text in which all the problems raised during the current session could be resolved.

19. Mr. RENGER (Germany) concurred with the view of the representative of the United Kingdom that if the draft text was to be returned to the Working Group - to which he had no objection - clear terms of reference must be laid out. Future action should be dictated by circumstances. As for adoption, the Commission might benefit from the discipline imposed by a timetable: a final text might be ready for adoption under a General Assembly resolution by 2001, whereas practical considerations suggested that a diplomatic conference could not be convened before 2002.

20. Ms. SABO (Observer for Canada) said that, following informal consultations with others, her delegation was firmly persuaded that the text would be best finalized by the Working Group. Some of the hardest decisions had already been taken and little time was available, since there was much else of importance to discuss. The Working Group would also produce a coherent text on which States could make comments.

21. Mr. IKEDA (Japan) said that the majority was clearly in favour of returning the draft text to the Working Group. As a member of the Group, he believed it capable of solving the outstanding problems and submitting a complete draft text to the Commission.

The meeting was suspended at 11.20 a.m. and resumed at 11.50 a.m.

Title of the draft Convention

22. The CHAIRMAN invited the Commission to resume consideration of the report of the drafting group (A/CN.9/XXXIII/CRP.2) and, in particular, to take a decision on the title of the draft Convention .

23. Mr. WINSHIP (United States of America) said that his delegation would have preferred the title "Draft Convention on the Assignment of Receivables"; however, there appeared to be a clear consensus in favour of "Draft Convention on Assignment of Receivables in International Trade".

24. Mr. MORÁN BOVIO (Spain), Mr. MARADIAGA (Honduras) and Mr. RENGER (Germany) said that their delegations joined that consensus.

25. Mr. MARKUS (Observer for Switzerland) said that he would prefer the title "Draft Convention on the Assignment of Receivables" since the inclusion of a reference to international trade might restrict the scope of the instrument, which covered not only trade, but also financial, receivables. However, he was prepared to join the emerging consensus.

26. Mr. LAMBERTZ (Observer for Sweden) said that he associated himself with the views expressed by the observer for Switzerland.

27. Mr. MORÁN BOVIO (Spain) pointed out that since the titles of the Commission's instruments almost always included a reference to international trade, those words should in no way be taken as limiting the scope of the draft Convention.

28. Mr. TELL (France) said that he would prefer to mention international trade in the title in order to make it clear that the draft Convention was not intended to cover the assignment of receivables at the domestic level.

29. Mr. IKEDA (Japan) said that he agreed with the representative of France.

30. Mr. MARADIAGA (Honduras) said that if a shorter title was desired, the instrument might be called "Draft Convention on International Assignment of Receivables".

31. Mr. MOHAMED (Nigeria) supported the inclusion of the words "international trade"; the concerns raised by the observers for Switzerland and Sweden could be addressed in the commentary.

32. The CHAIRMAN said that if he heard no objection, he would take it that the Commission had reached consensus on the title "Draft Convention on Assignment of Receivables in International Trade".

33. It was so decided.

Preamble (A/CN.9/470)

34. The CHAIRMAN invited the Commission to take a decision on the bracketed text contained in the preamble to the draft Convention (A/CN.9/470).

35. Mr. MORÁN BOVIO (Spain) said that in several cases, the question of which bracketed option to retain could be assumed to have been resolved by the Commission's decision on the title of the draft Convention.

36. Mr. RENGER (Germany) said that he would prefer to delete the bracketed words "that", "the" and "constitute an obstacle to financing transactions" from the second preambular paragraph.

37. Mr. IKEDA (Japan) said that his delegation was in favour of retaining the reference to financing transactions, the promotion of which was the primary objective of the draft Convention.

38. Mr. TELL (France) said he agreed that the instrument's purpose would be lost if the words "constitute an obstacle to financing transactions" were deleted; it must be clear that the draft Convention was intended to facilitate receivables financing rather than simply resolving conflicts between different national legal systems. He would therefore prefer to retain all the words currently placed in brackets in the second preambular paragraph.

39. Mr. MORÁN BOVIO (Spain) suggested that the Commission should adopt the German proposal to delete all the bracketed material in that paragraph except the words "of receivables" and to address those issues in the commentary. However, he was prepared to defer to the majority view.

40. Ms. SABO (Observer for Canada) said that the Working Group had discussed the matter at length. Her preference would be to delete all the material contained in brackets in the second preambular paragraph; however, as a compromise, she proposed that the bracketed text should be retained and the words "in international trade" deleted.

41. The CHAIRMAN pointed out that the Canadian proposal did not address the question of whether the Commission wished to include an explicit reference to financing.

42. Mr. PINZÓN SÁNCHEZ (Colombia) said that since the Commission had decided not to mention receivables financing in the title of the draft Convention, it might be best to delete the second preambular paragraph and to consider whether the subject of financing should be covered in the third and fifth preambular paragraphs.

43. Mr. WINSHIP (United States of America) said that his delegation associated itself with the statements made by the representatives of Japan and France and supported the amendment proposed by the observer for Canada. The fact that the problems mentioned in the first line of the paragraph constituted an obstacle to financing transactions was one of the chief reasons for the need to adopt the uniform rules referred to in the fifth preambular paragraph.

44. Moreover, the decision to refer to the preamble in article 7 (1) gave it an importance that should be explicit in the text of the draft Convention, particularly as the form and status of the commentary had yet to be determined.

45. Mr. DOYLE (Observer for Ireland) said he agreed that the preamble was more important than might first appear and that he would prefer to retain the bracketed text in the second preambular paragraph: however, he had no strong feelings on the matter.

46. Ms. McMILLAN (United Kingdom) said she would not wish to lose the paragraph as a whole, as it expressed part of the reason for the Convention. Her delegation supported retention of the paragraph, as reworded by Canada.

47. Mr. MARADIAGA (Honduras) suggested that the Secretariat should take care of some of the drafting. As the Commission had decided to use the wording "assignment of receivables in international trade" in the title of the Convention, the bracketed expressions in the preamble referring to "financing" were no longer required.

48. Mr. RENGER (Germany), Mr. MORÁN BOVIO (Spain) and Ms. STRAGANZ (Austria) said they supported the new wording.

49. The CHAIRMAN said he took it that the second preambular paragraph would be reworded as suggested by the Canadian delegation.

50. Mr. WINSHIP (United States of America) suggested that the words "receivables financing" and "financing" should be deleted in the third preambular paragraph. However the clause beginning "including but not limited to ..." should be retained in order to alert the reader as to the types of transactions covered by the draft Convention. The list might not be complete, but the illustrations given stressed the importance of the text and the wide variety of transactions.

51. Mr. MORÁN BOVIO (Spain) and Mr. TELL (France) said they shared the views expressed by the United States delegation.

52. Mr. TELL (France) noted that, in view of the change in article 11 made the previous week, the text did not in fact protect "existing assignment practices".

53. Ms. WALSH (Observer for Canada) agreed with the proposal to delete the reference to "receivables financing" and "financing" in the third paragraph. However, she was concerned that the illustrative list did not refer to the very important use of assignment transactions in providing collateral for loan financing. Also, the list could be under-inclusive, become dated over time and give rise to unnecessary interpretation difficulties. It would be simpler to delete the list rather than to discuss what should be included.

54. Ms. GAVRILESCU (Romania) said she shared the views expressed by the United States delegation but also agreed with the concerns of the Canadian delegation. Perhaps there could be a compromise solution, as the list did not exclude other possibilities.

55. Mr. DOYLE (Observer for Ireland) said he shared the concerns of the Canadian delegation and was also in favour of deleting the list.

56. Ms. McMILLAN (United Kingdom) said she was also in favour of deleting the list. There was already a list of exclusions in article 4, as well as the list of inclusions in articles 11 and 12. The difficulty of having an additional list in the preamble was that it might seem to conflict with the later text.

57. The CHAIRMAN noted that the United States delegation had mentioned on a previous occasion that inclusion of the list would give a signal to those industries to which it referred.

58. Mr. RENGER (Germany) agreed with the views expressed by the United Kingdom delegation. Also, he doubted whether the industries referred to would actually read the preamble.

59. The CHAIRMAN said he took it that the Commission accepted the paragraph, with the deletion of the list and the deletions suggested by the United States delegation.

60. Mr. BURMAN (United States of America) said he recognized the concerns expressed. He suggested that the issue should be highlighted in the commentary, subject to the Commission's determination of the term and status of the commentary. Those who had not had the benefit of attending the working groups would then have the opportunity to see what kind of subjects were relevant, subject to the comments and observations made in relation to articles 4, 11 and 12.

61. Ms. McMILLAN (United Kingdom), referring to the fourth preambular paragraph, suggested that when the Working Group reconvened it should consider inserting an additional paragraph to highlight the fact that, while adequate protection for the interests of the debtor should be secured, national law would be preserved in important areas such as preferential creditors and the national system of land registration which governed priority.

62. The CHAIRMAN noted that the Commission was aiming to complete the preamble at the present session. The Working Group's time could be used optimally in relation to those provisions that it had not yet considered.

63. Ms. GAVRILESCU (Romania) associated herself with the views expressed by the delegate of the United Kingdom. She would not object to the present text of the fourth preambular paragraph, but she supported the proposed addition.

64. Mr. WINSHIP (United States of America) said that the terms of reference for the Working Group should all be decided at the same time. If they were to accept the United Kingdom proposal, additional concerns might also be added to the preamble during the consideration of the draft text, and the preamble would become unnecessarily long. He preferred to retain the present wording of the fourth preambular paragraph.

65. Mr. DOYLE (Observer for Ireland) agreed with the previous speaker. He appreciated the merits of the United Kingdom proposal, but the aim of the present debate was to finalize the preamble. The Commission should not consider any additional proposals.

66. Mr. MORÁN BOVIO (Spain) said that the purpose of the present exercise was to decide whether to retain or delete the sections of the text marked by square brackets. His delegation had difficulty with the United Kingdom suggestion because international trade law was not intended to reduce or diminish national

law, nor to attack established legal practices for dealing with real estate issues.

67. Mr. HERRMANN (Secretary of UNCITRAL) pointed out that the concern to preserve national law had been highlighted several times in the guide to enactment of the recently adopted Model Law on Cross-Border Insolvency, although the preamble to that text did not refer to the issue. It would be consistent to proceed along similar lines.

68. The CHAIRMAN said that the fourth preambular paragraph would remain as it was.

69. Mr. RENGER (Germany), referring to the fifth preambular paragraph, suggested that the words "in", "financing" and "capital and", which were in square brackets in the text, should be deleted.

70. Ms. WALSH (Observer for Canada) said she agreed with the previous speaker but would prefer to retain the words "capital and", which would allow the text to more accurately reflect the dual use of assignment of receivables in the context of the draft Convention, both in the sale or transfer of the receivables and in their use as collateral in a secured credit transaction. The reference to "credit" alone would not capture the full breadth of the draft Convention.

71. Mr. MORÁN BOVIO (Spain), Ms. STRAGANZ (Austria) and Mr. WINSHIP (United States of America) supported the Canadian proposal.

72. Mr. BERNER (Association of the City Bar of New York), in the absence of his colleagues from EUROPAFACTORING and Factors Chain International, endorsed the Canadian proposal.

73. Mr. MOHAMED (Nigeria) said that the reference to promoting the availability of capital and credit should precede the reference to the development of international trade.

74. Mr. TELL (France) supported the Nigerian proposal to reverse the two clauses in the fifth preambular paragraph. Promotion of the availability of capital and credit would by definition help to facilitate the development of international trade. It was more logical to move from a particular to a general reference.

75. Ms. McMILLAN (United Kingdom) said that the preamble was important and should refer to the most significant points of the draft Convention. She therefore supported the Nigerian proposal.

76. Mr. MORÁN BOVIO (Spain) and Ms. SABO (Observer for Canada) also supported the Nigerian proposal.

77. Mr. Al-NASSER (Observer for Saudi Arabia) supported the wording proposed by the Nigerian and Canadian delegations.

78. The CHAIRMAN said he took it that the Commission accepted the Nigerian proposal. The Secretariat would redraft the paragraph.

The meeting rose at 1 p.m.